United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-7060
75-7641

To be argued by
MURRAY GARTNER

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United States Court of Appeals
FOR THE SECOND CIRCUIT

P/S

JAPAN AIR LINES COMPANY, LTD.,
Plaintiff-Appellee,

v.

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO ("IAM"), *et al.*,
Defendants-Appellants.

APPELLEE'S BRIEF

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Preliminary Statement

Japan Air Lines Company, Ltd. ("JAL") brought this action in January 1975 against defendants International Association of Machinists & Aerospace Workers, AFL-CIO ("IAM") and its agents, asserting that the IAM was violating the requirements of the Railway Labor Act ("RLA"), 45 U.S.C. §§151-188, by its unlawful insistence on the union's so-called "Scope" demand, in pending negotiations for changes in the agreement between JAL and IAM. The IAM represents some 200 mechanics and ground service employees of JAL in the United States. It insisted throughout the negotiations, which were then approaching the end of the 30-day "cooling-off" period provided by the RLA, that JAL agree to stop contracting out maintenance and ground service work,

which has been performed by other companies at JAL's four stations in the continental United States for as long as twenty years.

The IAM demanded that JAL establish its own facilities and hire its own employees, to be represented by the IAM, to do work then and for a long time subcontracted to other companies. JAL asserted that it had no duty under the RLA to bargain over the "Scope" demand, and that the IAM's insistence upon the "Scope" demand as a condition of reaching an agreement on the terms of employment of JAL's present employees represented by the IAM was, therefore, a violation of the duty imposed by Section 2, First of the RLA to "exert every reasonable effort to make and maintain agreeements concerning rates of pay, rules, and working conditions. . . ." Less than seven hours before the expiration of the "cooling-off" period, on January 22, 1975, the district court (Ward, J.) issued a temporary restraining order, effective until January 31, 1975, against the IAM's insisting on bargaining on the "Scope" issue and against a strike predicated on that demand.

Following an evidentiary hearing on plaintiff's motion for a preliminary injunction, the district court issued its opinion* on February 19, 1975, holding that the union's "Scope" proposal was not a mandatory subject of bargaining under the RLA, but denying injunctive relief to JAL because of the court's

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* The opinion of the district court is reported at 389 F. Supp. 27.

"assumption that the IAM did not make 'Scope' a pre-condition to reaching agreement."

JAL and IAM reached agreement on a new contract on February 22, 1975, one day after entry of the court's order denying an injunction and dissolving the temporary restraining order which had been extended beyond January 31, 1975. The parties thereafter stipulated, pursuant to Fed. R. Civ. P. 65(a)(2), that the trial on the merits be deemed advanced and consolidated with the evidentiary hearing on plaintiff's application for a preliminary injunction, and that admissible evidence in the record of that hearing be the trial record.

On October 15, 1975, a final declaratory judgment was entered by the district court, declaring that the IAM's "Scope" proposal "is not a mandatory subject of bargaining" and that "JAL has no duty under the Railway Labor Act (45 USC §§ 151-188) to bargain with the IAM over a 'Scope' proposal which would require JAL to alter the method it has heretofore chosen for conducting its business and to discontinue existing contractual arrangements for performance of work or to hire additional employees, establish facilities or buy equipment to perform work at any location, not now being performed there by its own employees. . . ."

This appeal by the IAM is from the final declaratory judgment, and also from the initial nine-day temporary restraining order ("TRO"). JAL contends that the final declaratory judgment appropriately and correctly determined the legal

obligations of the parties with respect to bargaining over the IAM's "Scope" proposal in view of actual insistence upon that proposal in the collective bargaining negotiations which led to this action, and the clear likelihood of continued insistence by the IAM on the same proposal in future negotiations.*

The IAM's appeal from the issuance of the initial TRO is clearly moot, and presents no occasion for this Court to consider important unresolved questions concerning the accommodation of the Norris-LaGuardia Act to the Railway Labor Act in injunction actions brought to enforce the obligations of RLA Section 2, First.

Questions Presented

1. Whether the district court properly determined that the Railway Labor Act does not require a carrier to bargain with the certified representative of its current employees over a "Scope" proposal which would require the carrier to discontinue existing contractual arrangements for performance of work and to hire additional employees, establish facilities or buy equipment to perform such work which has never been performed by its own employees?

2. (a) Whether the appeal from the temporary restraining order which was issued on January 22, 1975 and expired on January 31, 1975, is moot?

(b) If not, whether Section 7 of the Norris-LaGuardia Act (29 U.S.C. § 107) applies to issuance of that order and was violated?

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* In negotiations now going on for changes in the agreement reached on February 22, 1975, the IAM is indeed making the very same demand.

Statement of Facts

A. JAL Operations in the United States

Japan Air Lines Company, Ltd. ("JAL") is a carrier by air within the meaning of Section 201 of the Railway Labor Act, 45 U.S.C. § 181. It operates flights into and out of five cities in the United States: Honolulu, San Francisco, Los Angeles, Anchorage and New York. The IAM* is the certified representative of some 212 JAL employees in the United States in the craft or class of Air Line Mechanics, including Ground Service and Ramp Employees, who perform work at four of the five United States stations served by JAL (Pl. Ex. 18(a), ¶¶4, 5, A-32-34).** At each of JAL's United States stations except Honolulu, all of the aircraft maintenance, and

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* The other named defendants include IAM District Lodge 151, the administrative and operational arm of the IAM with jurisdiction over JAL employees represented by the IAM, and individual defendants representing the IAM in negotiations with JAL.

** JAL's IAM represented employees in each classification perform work at each station as follows:

Honolulu - 20 aircraft mechanics, 4 plant mechanics, 63 ramp servicemen, 3 storekeepers;
New York - 5 plant mechanics and 48 ramp servicemen who perform work in connection with cargo operations only, 3 storekeepers;
San Francisco - 60 ramp servicemen, 3 storekeepers;
Los Angeles - 3 storekeepers;
Anchorage - JAL has no IAM-represented employees at Anchorage. Pl. Ex. 18(a), ¶5, A-33-34.

["A" followed by number refers to pages in Volumes I and II of Joint Appendix. "E" followed by number refers to pages in Volume III of Joint Appendix. "Pl. Ex." and "Def. Ex.", followed by exhibit number, refer to Plaintiff's and Defendants' Trial Exhibits, located in Volume III of Joint Appendix, except for Pl. Exs. 18(a) and 18(b) which are reproduced in Volume I of Joint Appendix.]

some or all of the plant and equipment maintenance and ground servicing of JAL's flights, is performed by other companies pursuant to long-standing contractual arrangement with JAL. (Pl. Ex. 18(a), ¶6, A-34-35; Opinion, A-184). None of the work which is now contracted out by JAL at these stations has ever been performed by JAL's own employees (Pl. Ex. 18(a), ¶7, A-36; A-256-258, 494-495).

When JAL initially began service to the United States in 1954, it had no ground service employees of its own in Hawaii or the mainland United States. United Air Lines performed all the maintenance and ground service work for the JAL flights, until JAL decided to and did hire its own maintenance and ramp service employees in Honolulu, approximately a year after JAL's flights to the United States began (Pl. Ex. 18(a) ¶7, A-36). (Employees of United Air Lines, currently responsible for maintenance of JAL aircraft in New York, San Francisco and Los Angeles, are also represented by the IAM (A-457)). Only 15 employees, all stationed in Hawaii, were covered by the first agreement between JAL and IAM, effective March 1, 1959, following the IAM's certification as representative of the craft or class

of Air Line Mechanics and Ground Service and Ramp Employees by the National Mediation Board in December, 1958 (Pl. Ex. 18(a), ¶8, A-36).

Maintenance and ground service work at JAL's United States mainland stations has been contracted out to other companies since the initiation of JAL flights at these stations, at San Francisco in 1954, Los Angeles and Anchorage in 1959, and New York in 1966 (Pl. Ex. 18(a), ¶7, A-36; Pl. Ex.7, E-16; A-456-457). As its operations in the United States expanded, however, JAL from time to time determined to hire its own employees to do certain ground service and maintenance work previously contracted out, resulting in the staffing at JAL's United States stations as described above at page 5 (Pl. Ex. 18(a), ¶7, A-36).

B. Negotiations between JAL and IAM over Proposed Changes in 1972-1973 Labor Agreement

1. IAM "Scope" Proposal

Pursuant to the provisions of Section 6 of the RLA, the IAM notified JAL on September 28, 1973 of some 75 proposed changes in the existing agreement between JAL and IAM, effective from March 1, 1972 through October 31, 1973, and covering JAL's United States IAM-represented employees (Pl. Ex. 1, E-1-7). While most of the IAM's proposals concerned rates of pay, rules and working conditions of those employees,

the IAM's notice also included a proposal to amend Paragraph D of Article I of the Agreement, entitled "Scope of Agreement", as follows:

> "Paragraph D. Amend to provide that during the life of this Agreement, the Company shall phase out the contracting of all work covered by this Agreement and employ its own personnel to perform such work". (Pl. Ex. 1, E-2).

Throughout the negotiations between JAL and IAM, the IAM's proposal that JAL cease contracting out work at its stations at Los Angeles, San Francisco, New York and Anchorage, and hire more employees, to be represented by the IAM, to perform that work, was referred to by the parties as the "Scope" demand (A-362, 259; Pl. Ex. 18(a), ¶¶ 11, 12, 21, A-38-39, 44-45; Pl. Ex. 13, E-24; Pl. Ex. 2, E-9-10) and is similarly referred to by the court below (A-184, 220), and by appellant (IAM Br., p. 2). That "Scope" demand became the hard core of the dispute during the negotiations, which stretched over some fifteen months from November 1973 through January 1975. As the district court put it, IAM's insistence on "Scope" and JAL's refusal to bargain on it "were significant factors in the parties' failure to reach agreement" (A-194).

In accordance with the RLA scheme for resolution of so-called "major disputes" over changes in existing agreements, JAL and IAM met in direct negotiation sessions from November, 1973 through January, 1974. After application by JAL for the mediation services of the National Mediation Board ("NMB"), the parties met in four mediation sessions with a mediator appointed by the NMB (Pl. Ex. 18(a), ¶¶12-21, A-39-45; Opinion, A-185-191). On December 17, 1974, the NMB requested that JAL and IAM submit the dispute over proposed changes in the Agreement to arbitration, in accordance with Section 5, First of the RLA (Pl. Ex.3, E-11).* JAL agreed to submit all issues to arbitration except the IAM's "Scope" demand (Pl. Ex. 4, E-12). The IAM, however, rejected the proffer of arbitration.

The NMB, therefore, served notice that its services were terminated as of December 23, 1974 (Pl. Ex. 5, E-13-14), thus ordinarily leaving the IAM free to strike following expiration of the statutory 30-day "cooling-off" period on January 23, 1976. Without reassuming jurisdiction over the case, the NMB subsequently invited the parties to meet, with the assistance of a mediator, beginning on January 14, 1975 (Pl. Ex. 6, E-15). Meetings were held beginning on January 15, and continuing through

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* The IAM incorrectly states that JAL "requested the National Mediation Board to proffer arbitration on all issues except 'Scope.'" (IAM Br., p. 7)

January 31, 1975 (A-364). On January 22, 1975, following a hearing on JAL's motion for preliminary injunction on January 16, the court issued a temporary restraining order, enjoining a strike by the IAM which had been threatened to begin following the expiration of the 30-day "cooling-off" period on January 23, 1975, and enjoining defendants from insisting or demanding that JAL bargain over "Scope."* (A-148-151) The temporary restraining order was extended by orders of the district court on January 27, January 31, and February 7, 1975 (A-156-157; A-178-179; A-504).

2. IAM Insistence on "Scope" Proposal

The district court's opinion acknowledged, as plaintiff claimed, that defendants had insisted upon bargaining on their "Scope" demand (A-194, 200, 202). The court further found as a fact "that the union's insistence upon bargaining on 'Scope' and JAL's refusal to negotiate the issue were significant factors in the parties' failure to reach agreement" (A-194). Nevertheless, the court held that "the IAM's insistence upon bargaining on 'Scope', in and of itself, is not sufficient to establish a §2, First, violation. . . ." (A-202). It explained that "The Court's view that the union has not violated its §2, First, duty depends upon its assumption that the IAM did not make

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* The TRO did not require defendants to bargain with JAL on all issues other than "Scope," as IAM incorrectly states in its brief (IAM Br., pp. 1, 4).

'Scope' a pre-condition to reaching agreement," (A-203-204) and that "the Court cannot agree with plaintiff's contention that the defendants conditioned agreement upon acceptance of their 'Scope' demand." (A-194; emphasis added).

If the district court's statements are intended to differentiate between insistence on bargaining as merely a continuous broaching of the subject and insistence on a concession on the subject as a pre-condition to agreement, and if the court's "assumption" that "Scope" was not a "pre-condition to reaching agreement" is intended as a finding, such differentiation and such a finding, on the record of this case, are clearly erroneous. The uncontroverted testimony, and the very notes of the union's own witnesses, the IAM's chief negotiation spokesmen Robert Quick and Fusao Ogoshi, established that the union negotiators repeatedly told the company that there would be no agreement without "Scope", that the negotiating committee would not recommend a "yes" vote on a contract unless the company gave something on "Scope", and that if the company would just make a concession on "Scope", there could be an agreement. (See pp. 12-15, below). The IAM's position was clear from at least the first mediation session in June, 1974, and remained unchanged until the court's issuance of a temporary restraining order against insistence by IAM on the "Scope" demand on January 22, 1975.

(a) First Mediation Session

Mr. Ogoshi's handwritten notes of the meeting of June 29, 1974, during the first mediation session when the parties were reviewing the posture of their negotiations in the presence of the mediator, show that the IAM expressly conditioned any agreement upon acceptance by JAL of the "Scope" demand. According to Mr. Ogoshi's notes, Mr. Quick told JAL's representative, Mas Yonemura, that "without scope we will recommend a no vote even if you were to give us all that we proposed"; that "there will be no agreement without scope"; and that, "If there was no issue on scope", "we can have an agreement at least in principle before the sun goes down today...." (Pl. Ex. 12, E-22-23).

(b) Second Mediation Session

Mr. Quick's testimony as to his own statements at the August 3, 1974 meeting explicitly admits that "I told the company that we had decided that this committee could not go out and recommend acceptance of the contract unless there was some change, clarification, a change in the scope rule" (A-416).*

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* Mr. Quick's testimony as to the statements on August 3 is supported by that of his co-negotiator, Mr. Ogoshi (A-395), and that of plaintiff's witnesses, Shigeo Kasumi (Pl. Ex. 18(a), ¶ 17, A-41-42) and Wayne Kuramoto (A-267-268). The district court found in its opinion that on August 3, Mr. Quick "told JAL that the union had to have some change on 'Scope'. He explained that there was great concern with lay-offs and the union bargaining committee could not recommend ratification of the proposed contract without something from the company on 'Scope'" (A-189).

(c) Third Mediation Session

Mr. Quick repeated on several occasions, during this session, according to his own testimony, that JAL would have to make a concession on the "Scope" issue in order to reach an agreement with the union. Thus, Quick testified that he told the Company that "I insisted that we have something on the scope" (A-420) and that "I told the company that our position was that without a change on the scope we were going to recommend no" (A-424).

Quick stated that while JAL had matched the IAM's May, 1974 settlement with United Air Lines, which other airlines had settled for as well, it would take a concession on "Scope" to get an agreement. He said to JAL representative Wayne Kuramoto, "if we could even get Los Angeles on this scope . . . if we could just get that, Wayne, we could go out and recommend yes" (A-426).*

(d) IAM's Statement to Mediator

Following the third mediation session, Mr. Ogoshi had a telephone conversation with the mediator on October 22, in which he stated to the mediator that unless JAL had an offer on "Scope", "it is fruitless to continue meeting with

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* The Court found in its opinion that at the third mediation session, "Mr. Quick, on behalf of the IAM, . . . indicated that the bargaining committee could not recommend ratification unless JAL made some offer on 'Scope' and that the membership was likely to vote the contract down absent some concession on 'Scope'" (A-190).

the Company" (A-358, 360). He reported this conversation to IAM Vice President John Peterpaul by telegram the following day, as follows:

> "Called Mediator Walter Phipps last night. Said NMB suggested another meeting with JAL. Asked for what purpose when he knows very emphatically companies refusal to bargain on scope. Requested he call Kasumi JAL decision maker and ask if he will bargain on scope . . ." (Def. Ex. E, E-77)

(e) Fourth Mediation Session

At the final mediation session on November 12 and 13, 1974, Mr. Quick again stated to the company that "Scope" was an essential condition to any agreement. Mr. Quick testified that he told Mr. Kuramoto that "You have to make some change in the scope rule before you are going to get an agreement. . ." (A-428), and that "I as spokesman for the union insisted that we have an offer on scope"* (A-408).

(f) IAM's Continued Insistence on "Scope" Until Restrained by Court

Even after the last mediation session, when it is conceded that JAL had plainly told the IAM that it had no obligation to bargain over "Scope", and would not make any offer on "Scope" (Opinion, A-191; A-400, 428), the IAM continued to insist on its "Scope" demand as a pre-condition to any

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* The Court found that "On November 12, Mr. Quick again stated the union had to have something on 'Scope' to satisfy its members" (A-190).

agreement, until, as Mr. Ogoshi admitted, it was restrained by the January 22, 1975 order of the court (A-383).*

3. JAL Consistently Refused to Bargain Over "Scope"

The IAM seeks to portray JAL as having suddenly switched its position on "Scope" at the last mediation session in November, 1974, after having freely bargained over the issue in these and prior negotiations (IAM Br., pp. 8, 35-37). In fact, JAL's rejection of bargaining over the "Scope" demand was clear and consistent throughout.

JAL's refusal to bargain over "Scope" in the current negotiations, as found by the court below, is not challenged by the IAM. Moreover, JAL had clearly announced the reason for its refusal to bargain as early as July 1, 1972 in the negotiation over the prior contract. (A-448-453; Pl. Ex. 18(b), ¶6, A-113-114) The one specific change which the IAM points to as a "Scope" concession, in the prior contract, resulted from a Mediator's proposal and not from bargaining over the issue. (A-470) It was not regarded even by the union as a concession on "Scope" when made (Pl. Ex. 18(b), ¶¶8-10, A-115-118; Pl. Ex. 18(a), ¶17, A-41-42; A-423-424,

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* On November 26, 1974, JAL Vice President Kiichi Ito sent a letter to all of JAL's IAM employees summarizing JAL's position in the contract negotiations, and explaining why JAL had refused to bargain with the Union over "Scope." (Pl. Ex. 2, E-9-10). The IAM's insistence upon the "Scope" demand even after that date is shown by the IAM proposal made on January 20, 1975, for a schedule calling for the manning of all JAL stations in the continental United States with IAM represented employees by July 1, 1976 (Pl. Ex. 13, E-24; A-484-486, 251-255, 270-271).

432, 469-470) and, in any event, does not establish a custom or practice of bargaining over the issue.*

(a) JAL's Refusal to Bargain Over "Scope" in 1973-1975 Negotiations.

The district court found that JAL "consistently refused to bargain" on "Scope" by refusing to make any offer on the subject during the 1973-1975 negotiations (A-188, 194, 200). The evidence, moreover establishes that JAL denied an obligation to bargain on that subject. (Pl. Ex. 2, E-10; Pl. Ex. 18(b), ¶¶2, 3, A-108-112; Pl. Ex. 32, E-40; Def. Ex. E, E-77; A-358-360, 418-419, 471-472, 482-483, 238, 259-260, 264-266, 269). The district court made no contrary finding, and the IAM only asserted that it was not aware of JAL's refusal to bargain until November 13, 1974 (cf. the contrary evidence of Fusao Ogoshi's telegram of October 23, 1974, Def. Ex. E, E-77), but the IAM nevertheless continued to insist upon a "Scope" concession until the TRO was issued on January 22, 1975 (A-383).

(b) JAL's Refusal to Bargain Over "Scope" in 1972-1973 Negotiations.

During negotiations between JAL and IAM over changes in the Agreement effective until March 1, 1972 (the Agreement immediately prior to the Agreement current when this action was begun (Def. Ex. A, E-41-76a)), the IAM had proposed

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* Moreover, voluntary agreement as to a permissive subject of bargaining does not convert that subject into a mandatory item of bargaining. See pp. 51-52, below.

an amendment to Paragraph D of Article I substantially the same as its "Scope" demand made in the 1973 negotiations (Pl. Ex. 18(b), ¶5, A-113; A-367, 429; Opinion, A-184-185). JAL's response to the IAM's "Scope" demand during the 1972-1973 contract negotiations, as explained in July, 1972 by Mr. Susumu Saito, Senior Vice President of JAL, was that JAL had no obligation to bargain with the IAM over the management decision of whether to hire more employees to perform work which JAL has not decided to do itself* (A-448-453; Pl. Ex. 18(b), ¶6, A-113-114). JAL maintained its position throughout the subsequent mediation sessions that the company had no obligation to bargain over the IAM's "Scope" proposal (Pl. Ex. 18(b), ¶7, A-114-115; A-463-464).

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* The district court, without ever referring to Mr. Saito's statement at the July, 1972 negotiation session, found that:

> "Although American counsel had been consulted in 1972, and had allegedly rendered an opinion relating to JAL's legal obligation to bargain on 'Scope', this opinion was never communicated to the IAM." (A-185)

Whether or not the legal opinion was communicated, the evidence as to the statement by Mr. Saito (Pl. Ex. 18(b), ¶6, A-113-114; A-448-453, 474-475) is not controverted. Indeed, Mr. Ogoshi, the IAM's chief negotiator at the time, confirmed that Mr. Saito had spoken at the last direct negotiation conference in 1972 (A-366), but he testified that he did not recall what Mr. Saito said about the IAM's "Scope" demand, except that JAL had no plans to "open up" [by hiring its own employees] any areas on the mainland (A-367-368). Mr. Quick was not present at the July, 1972 session (A-445).

(c) Mediator's Proposal for IAM to Withdraw "Scope" Demand in 1973.

In March, 1973, while the parties were still in mediation, the NMB mediator, Walter Phipps, made a "Mediator's Proposal" to both JAL and IAM in an attempt to break the logjam (Pl. Ex. 18(b), ¶¶7-9, A-114-118; Pl. Ex. 17, E-33-34; A-467-468). Apparently, the mediator had been persuaded that the IAM would withdraw its "Scope" proposal if JAL agreed to a no-layoff clause for present employees, a bargainable item, and agreed that the company would hire five employees to do the JFK Cargo Warehouse maintenance work in place of the contractor who was then doing that work. Relying on the Mediator's judgment that the IAM would withdraw its "Scope" proposal, JAL offered the terms which appear as Appendix D and Appendix E to the 1972-1973 Agreement (Pl. Ex. 17, E-33-34; Pl. Ex. 18(b), ¶¶7-9, A-114-118).

(d) JAL Acceptance of Mediator's Proposal Not Considered as Concession on "Scope".

The letter agreement included in the 1972-1973 Agreement as Appendix E is a simple no-furlough agreement for the duration of the contract, covering existing employees, which was plainly a proper and mandatory subject of bargaining. JAL did not bargain over the terms of Appendix D (A-470); and the IAM did not consider that Appendix D met its "Scope" demand and so submitted JAL's entire proposal for an Agreement

for ratification, without a recommendation (Pl. Ex. 18(b), ¶10, A-118; Pl. Ex. 18(a), ¶17, A-41-42; A-423-424, 432, 469-470, 267-268).

(e) JAL Reiterated Its Position Regarding "Scope" Throughout 1973-1975 Negotiations.

In the negotiations over the proposed changes in the 1972-1973 Agreement, JAL repeatedly stated that its position remained the same as stated by Mr. Saito in July, 1972 (Pl. Ex. 32, E-40; Pl. Ex. 12, E-21; A-471-472, 482-483, 240-243). By at least October 22, 1974, the IAM knew "very emphatically" of JAL's "refusal to bargain" over "Scope", in the words chosen by Mr. Ogoshi, an experienced professional labor negotiator (Def. Ex. E, E-77; A-358-360). At the very latest, by the IAM's own evidence, on November 13, 1974, Mr. Kasumi stated that JAL had no obligation to bargain over "Scope" (A-428, 400; IAM Br., p. 8). Yet the IAM continued to insist on its "Scope" demand as a pre-condition to any agreement, except as restrained by the January 22, 1975 order of the district court (A-383, 247, 251-253, 270-271).

C. Proceedings in the District Court

JAL began this action on January 13, 1975, ten days before the impending end of the procedures mandated by the Railway Labor Act for resolution of the "major dispute" between JAL and IAM. It sought preliminary and permanent injunctive relief against defendants' continued unlawful

insistence on the "Scope" demand and against the threat of a strike to begin on January 23, 1975.*

On January 16, 1975, appearing pursuant to an Order to Show Cause bringing on JAL's motion for preliminary injunction, defandants' attorneys requested a continuance until such time as defendants would be able to present witnesses (A-225). The court offered to hold the hearing at a later date, if defendants consented to the entry of a temporary restraining order until January 31, 1975, so that the motion for preliminary injunction could be heard and determined before defendants began the strike which JAL was seeking to enjoin.** Defendants refused to accept the court's proposal (A-230-236).

The court thereupon denied the motion for a continuance and proceeded to hold an evidentiary hearing at which two witnesses for plaintiff testified, and were cross-examined by defendant's attorney. At the close of the hearing, defendant's attorney asked leave to submit affidavits in opposition

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* The complaint sought a permanent injunction against the the defendants to restrain them from "directly or indirectly insisting or demanding that JAL bargain with the IAM over the IAM's proposed change in the 'Scope of Agreement' clause in the Agreement between JAL and IAM, or over any similar proposed change regarding JAL's right to determine whether to hire employees, establish facilities, or buy equipment to perform work at any location in the United States." (A-21; emphasis added.)

** The Court explained that pre-existing calendar commitments would prevent a hearing for at least a week, if one were not held that day (A-227-228, 225).

to the motion (A-287). The court agreed to accept affidavits from the IAM by January 20, 1975, as well as answering affidavits and memoranda of law (A-288).

At 4:30 p.m. on January 22, 1975, pending determination of the motion for preliminary injunction, on notice to defendants' attorneys, JAL applied to the district court for a temporary restraining order against the strike threatened to begin at midnight (A-291). At the hearing, defendants failed to cite any authority that the court lacked jurisdiction (A-297-299) and could predict no readily identifiable irreparable injury to the IAM if the order were issued apart from delay in beginning the strike (A-304-310). The court therefore isssued a temporary restraining order for a period of nine days, until January 31, 1975, "to allow the Court the time necessary to resolve" the "very complex legal and factual questions which are impossible of speedy resolution in a judicious fashion" and finding that if the court did not issue the temporary restraining order "the case presently before it would in effect become moot"* (A-312-313).

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* The court's order enjoined defendants: (a) "from directly or indirectly insisting or demanding that JAL bargain with the IAM" over the "Scope" demand; and (b) from "engaging in any strike, concerted refusal to report to work, or accept regular duty assignments or any other concerted work stoppage work slowdown, or interference with plaintiff's normal operations. . .," until such time as JAL and IAM bargained in accordance with requirements of the RLA. (A-150-151).

At the very conclusion of the hearing, defendants' attorney tentatively suggested (A-323) to the court that the temporary restraining order exceeded the five-day period provided in the Norris-LaGuardia Act. The court invited counsel for defendants to "move within the next five days. . . on papers with a memo to dissolve the TRO after five days." (A-323) Defendants failed to so move.

Instead, on January 23, 1975, defendants filed a notice of appeal from the order and obtained an order to show cause signed by Circuit Judge Mulligan bringing on a motion to vacate the temporary restraining order on January 28, 1975. That motion was denied by this Court, which ordered the appeal heard on an expedited basis. (Order of Court of Appeals in Docket 75-7060, dated January 28, 1975).*

On January 27, 1975, the district court entertained a motion to extend the TRO made by JAL because of the IAM's stated position to the Court of Appeals that the TRO expired at the end of five days. After argument by the parties, the court decided that it had power to extend the TRO, so long as it was not for any excessive period, whether or not the Norris-LaGuardia Act applies, and that the TRO would be continued "whether ab initio or by extension up to and including

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* JAL moved to dismiss the appeal, but argument on that motion and on the appeal was adjourned by order of the Court, dated February 24, 1975, following the district court's order entered on February 21, 1975 denying a preliminary injunction and dissolving the temporary restraining order.

January 31, 1975 at 5:00 p.m." (A-336-337; A-156-157)*

On January 31, 1975, having been unable to reach a decision or conduct a further hearing by that date, the district court extended the temporary restraining order for an additional ten days after again offering to decide the motion on the evidence previously submitted, if the IAM so chose. (A-341-342; A-178-179) Upon the IAM's renewed request for a further hearing, the court set a hearing to begin on the earliest date possible for defendants, February 4, 1975 (A-343-344).

The court conducted the additional evidentiary hearing on February 4, 5, 6 and 7, 1975, hearing two witnesses on behalf of defendants and rebuttal on behalf of plaintiff. At the conclusion of the hearing, the court invited counsel for IAM to set the shortest possible schedule for filing of post-hearing papers, and consequently extended the temporary restraining order until February 19, 1975, which was the earliest date the court could set for filing of an opinion on the preliminary injunction motion, based upon defendants' request to file

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* Defendants rejected the court's offer to decide the motion for preliminary injunction on the basis of the hearing on January 16 and the affidavits submitted by both parties (A-334-335), and requested the opportunity to present witnesses on defendants' behalf.

post-hearing papers by February 12. (A-502-504). On this appeal, the IAM does not contest the court's extension of the temporary restraining order beyond January 31, 1975. (IAM Br., p. 4; Stipulation dated January 14, 1976).

The district court issued its opinion on plaintiff's motion for preliminary injunction on February 19, 1975. Addressing itself to the central issue presented on the appeal, whether the IAM's "Scope" demand is a subject "within the ambit of 'rates of pay, rules and working conditions' upon which the parties have a duty to bargain" (A-194), the court held that it was not, and that while the parties were free to bargain voluntarily over "Scope," it was not a mandatory subject of bargaining under the RLA. Holding that "existing subcontracting practices of JAL do not have an immediate and direct effect on the job security of present employees" (A-199), and that the "IAM's 'Scope' proposal goes directly to JAL's right to control the direction of its business enterprise" (ibid.), the court concluded that the "Scope" proposal was within an area of "managerial decision making or prerogative which is not within the ambit of mandatory bargaining. . ." (A-198).

In its view of "the whole of the union's conduct at the bargaining table," however, the district court held that

the IAM had not violated its duty under RLA Section 2, First, as it could not conclude that "the failure to reach agreement resulted solely from the IAM's insistence upon bargaining on the 'Scope' proposal" (A-202), or that "a strike would be solely to compel JAL to accede to the union's 'Scope' proposal" (A-203). Consequently, the court denied plaintiff's motion for a preliminary injunction, and ordered that the temporary restraining order be dissolved (A-204; A-209)*

Immediately following the district court's determination that JAL had no duty to bargain over "Scope," and denial of a preliminary injunction against a strike by defendants, JAL and IAM reached agreement on a new contract, to continue in effect until December 31, 1975. (A-216; A-212) At the same time, the IAM made known its clear intention to raise the "Scope" proposal once again in negotiations over changes in the new Agreement, which, in fact, began in November, 1975 and are

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* The court's order was made subject to a renewal of JAL's motion "upon a showing of changed circumstances or substantial additional evidence not previously available, in accordance with the Court's opinion" (A-209).

JAL believes the court's determination not to issue a preliminary injunction was erroneous, but that issue is not presented on this appeal.

continuing. (A-216; A-212)*

On October 15, 1975, after the parties had stipulated that the admissible evidence in the record of the hearing on plaintiff's motion for preliminary injunction be treated as the record of the trial on on the merits, pursuant to Fed. R. Civ. P. 65(a)(2), the district court entered a "Final Declaratory Judgment," setting forth the legal obligations of the parties with respect to a "Scope" proposal by the IAM (A-218; A-219-221). The Court declared:

> a) The IAM's "Scope" proposal that JAL phase out the contracting of all work covered by the Agreement and employ its own personnel to perform such work "while not an unlawful proposal, is not a mandatory subject of bargaining;"
>
> b) "JAL has no duty under the Railway Labor Act (45 U.S.C. §§ 151-188) to bargain with the IAM over a 'Scope' proposal which would require JAL to alter the method it has heretofore chosen for conducting its business and to discontinue existing contractual arrangements for performance of work or to hire additional employees, establish facilities or buy equipment to perform work at any location, not now being performed thereby [sic] its own employees;"
>
> c) The IAM "may not make acceptance by JAL of the 'Scope' proposal a condition of an agreement between the parties;" and

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* During the hearing on plaintiff's motion for preliminary injunction, IAM negotiator Fusao Ogoshi stated that the union would not drop the "Scope" demand unless and until the United States Supreme Court finally decided that it was not a mandatory subject of bargaining (A-393-394).

d) "[T]he parties may voluntarily bargain concerning any 'Scope' proposal." (A-220-221)

The court's declaration plainly is applicable to any "Scope" proposal the IAM may make in future negotiations, including the proposal which the IAM has made for changes in the 1973-1975 Agreement.

ARGUMENT

I.

This Is an Appropriate Case For a Declaratory Judgment.

While JAL's request for injunctive relief with respect to the contract negotiations and threatened strike in January 1975 became moot by virtue of the parties' subsequent agreement on a new contract, a declaratory judgment was clearly appropriate in this case, because of the continued controversy* about the propriety of a "Scope" demand in negotions expected to begin approximately a month after entry of the judgment. Those negotiations are now in progress.

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* The Declaratory Judgment Act, 28 U.S.C. § 2201, provides that in a "case of actual controversy within its jurisdiction," a court of the United States may "declare the rights and other legal relations" of an interested party "whether or not further relief is or could be sought", Beacon Construction Co., Inc. v. Matco Electric, Inc., 521 F.2d 392, 397 (2d Cir. 1975). The complaint herein asked not only for coercive relief, but also for "such other and further relief in law and equity as may be proper." See also, 6A J. Moore, Moore's Federal Practice ¶57.22[3] (2d ed. 1974).

In Super Tire Engineering Co. v. McCorkle, 416 U.S. 115 (1974), the Supreme Court ruled that an action by an employer seeking both declaratory and injunctive relief against a state welfare program which provided benefits to striking employees was not moot as to the declaratory relief sought, even though, as in the instant case, the strike had ended and a new collective bargaining agreement had been made.

The Court held that:

> "[E]ven though the case for an injunction dissolved with the subsequent settlement of the strike and the strikers' return to work, the parties to the principal controversy, that is, the corporate petitioners and the New Jersey officials, may still retain sufficient interests and injury as to justify the award of declaratory relief. The question is 'whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.' Maryland Casualty Co. v. Pacific Coal & Oil Co., 312 U.S. 270, 273, 61 S.Ct. 510, 512, 85 L.Ed. 826 (1941)." 416 U.S., at , 94 S.Ct., at 1698.

Here, the evidence shows that the IAM has persisted in the "Scope" proposals in negotiations over two contracts (see pp. 10-17, above; see also, A-426, 453, 458-459, 466), and has threatened to do so again in negotiations over changes in the February 22, 1975 Agreement which provided that it was subject to re-opening pursuant to the RLA at least thirty days before December 31, 1975. (See pp. 25-26 above.) The court's judgment plainly applies not simply to the concluded negotiations of the past, but to any "Scope" proposal by the Union

which would require JAL to cease its established subcontracting practices and to hire employees or establish facilities to perform work at any location where such work is not presently performed by JAL's own employees.*

Conduct "capable of repetition yet evading review," such as the IAM's insistence upon its "Scope" demand, has consistently been held to warrant issuance of a declaratory judgment. Super Tire Engineering Co. v. McCorkle, 416 U.S., at ___, 94 S.Ct., at 1700. See also, Roe v. Wade, 410 U.S. 113 (1973); Frost v. Weinberger, 515 F.2d 57, 62-63 (2d Cir. 1975); C-B Buick, Inc. v. NLRB, 506 F.2d 1086 (3d Cir. 1974) (enforcement of NLRB order remedying employer's refusal to bargain in good faith subsequent to execution of new bargaining agreement); Jersey Central Power & Light Co. v. Local 327, 508 F.2d 687 (3d Cir. 1975), petitions for cert. filed, 44 U.S.L.W. 3111 (U.S. Aug. 26, 1975) (No. 182), 44 U.S.L.W. 3253 (U.S. Sept. 28, 1975) (No. 465). In the Jersey Central Power & Light Co. case, the court looked "to the announced intentions of the defendants to take adverse action against the plaintiff," by insisting on adherence to contractual

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* Under 28 U.S.C. § 2202, the declaratory judgment issued by the court below is a basis for further relief in the future, including an injunction. Powell v. McCormack, 395 U.S. 486, 501 (1969). The IAM's Section 6 notice, served on November 28, 1975, true to the IAM's threat to continue to insist on its "Scope" demand, makes the ending of all subcontracting and the hiring of new employees to do that work the first proposal of the Union.

seniority provisions, and held that the case was appropriate for declaratory relief, 508 F.2d at 700. Just so, the defendants in this case have announced their intention to insist on bargaining over "Scope" in the future, and have, in fact, begun that process.

Even actions for injunctive relief only have been held not to be moot, simply because the activity sought to be enjoined may have ended. The Supreme Court has recently reiterated that, "it is settled that an action for an injunction does not become moot merely because the conduct complained of has terminated, if there is a possibility of recurrence, since otherwise the defendants would be 'free to return to . . . [their] old ways'" Allee v. Medrano, 416 U.S. 802, 94 S.Ct. 2191, 2198 (1974). See also Avco Corp. v. Local 787, UAW, 459 F.2d 968, 974 (3d Cir. 1972) ("If misconduct occurred in the past and the possibility of its recurrence survives, a case is not moot"); Southwestern Bell Telephone Co. v. Communications Workers of America, 454 F.2d 1333, 1334 (5th Cir. 1971); Amstar Corp. v. United Sugar Workers Local 9, 345 F. Supp. 331 (E.D.N.Y. 1972); Central Appalachian Coal Co. v. United Mine Workers of America, 376 F. Supp. 914 (S.D. W.Va. 1974); C.F.I. Steel Corp. v. United Mine Workers, of America, 372 F. Supp. 846 (D. Colo. 1973). The appropriate relief, therefore, in the circumstances, was the declaratory judgment rendered by the district court.

II

The District Court Properly Decided that JAL Has No Duty Under the Railway Labor Act to Bargain Over "Scope".

A. The RLA Compels Bargaining Only Over Mandatory Subjects of Bargaining.

The IAM's argument against the district court's conclusion that JAL has no duty under the RLA to bargain over a "Scope" proposal is premised primarily upon the IAM's arresting notion that any subject which is not specifically unlawful under the RLA is perforce a mandatory subject of bargaining under that Act. (IAM Br., pp. 31-33) This startling concept, soundly rejected by the court below (A-195), is without support in the statutory scheme, case precedent, or simple reason.

The IAM asserts boldly that the fundamental and well-established differentiation developed under the National Labor Relations Act ("NLRA") between "mandatory" and "permissive" subjects of bargaining has no application under the RLA (IAM Br., p. 31). Under the NLRA, parties are required to bargain only over those subjects which are "mandatory" subjects of bargaining. Employers and unions are free to bargain voluntarily over all other subjects, (except for "unlawful" matters), but neither side may insist upon a nonmandatory subject as a condition of an agreement. NLRB v. Wooster Division of Borg. Warner Corp., 356 U.S. 342 (1958).

The IAM cites Chicago & North Western Ry. Co. v. United Transportation Union, 402 U.S. 570 (1971), to caution this Court that parallels between the NLRA and RLA should be drawn "with full awareness of the differences between the statutory schemes." (IAM Brief, p. 33). But the IAM does not disclose what it is in the two Acts which may be thought to require radically different duties to bargain; it does not even address itself to the obligations which are imposed by the RLA.

Thus the IAM fails to recognize that under RLA Section 2, First, JAL has a stringent obligation to "exert every reasonable effort" to reach agreement with its employees on "rates of pay, rules and working conditions" and that employees and their representatives have an equally imperative obligation with respect to those subjects. The successive obligations imposed by the RLA upon carriers and the representatives of their employees with respect to proposed changes in agreements (Section 2, Seventh), to give notice of intended changes in agreements (Section 6), to confer about the proposed changes (Section 2, Second), and to participate in mediation under the auspices of the National Mediation Board if invoked by either party (Section 5, First) are similarly obligations which apply explicitly to disputes concerning "rates of pay, rules, or working conditions."

The IAM's position that the stern obligation imposed by these provisions applies to any subject which either party may desire to bring up, so long as it does not violate a specific provision of the Act, is clearly contrary to the statutory language and scheme, as the cases demonstrate. In Brotherhood of Railroad Trainmen v. Akron & Barberton Belt R. Co., 385 F.2d 581 (D.C. Cir.) cert. denied, 370 U.S. 923 (1968), the Court of Appeals plainly held that a union and carriers could voluntarily bargain over the union's proposal to make changes in a Board of Arbitration Award issued pursuant to a Special Act of Congress, during the limited two-year lifetime of the Award, but that the union could not make the proposal a mandatory subject of bargaining. The Court said,

> "We think it manifest that the proposal to scrap the Award during its life time could be broached to the carriers to see if they were interested but could not be presented to them as a subject of bargaining that was mandatory under a statutory obligation. We agree with Judge Bryan's approach that the collective bargaining system of the Railway Labor Act subsumes and presupposes a bargaining 'in good faith.' [footnote omitted] The issue of good faith is interlaced with 'bargainability' -- a term of art which means not only capable of being bargained but also a proper subject of mandatory bargaining." 385 F.2d, at 598. (Emphasis added).

Similarly, in International Association of Machinists & Aerospace Workers v. Northeast Airlines, Inc., 473 F.2d 549 (1st Cir.), cert. denied, 409 U.S. 845 (1972), the Court of Appeals refused a request by the IAM for an injunction

requiring the airline to bargain over a decision to merge, and over the impact of the proposed merger on employment security and other employment conditions. The Court held that the airline had no duty to bargain over these issues, not because agreement on these subjects would be unlawful under the RLA, but because to compel the carrier to bargain over these subjects would interfere with the airline's management decisions regarding the merger.

The IAM's attempt to recast the RLA by turning any demand not forbidden by the Act into a mandatory subject of bargaining relating to "rates of pay, rules, and working conditions" was properly rejected by the district court. It would not matter so much if the RLA did not require the parties to bargain about specified subjects, a requirement enforceable by a mandatory injunction such as the IAM attempted to get in the Northeast Airlines case. See, e.g. International Brotherhood of Teamsters v. BIC Guardian Services, Inc., 87 LRRM 2817 (N.D. Tex. 1974) (not officially reported). Since the RLA does so require, however, it is vital that "rates of pay, rules, and working conditions" does not get transformed, by impermissible construction, into "whatever is not specifically illegal."

B. The IAM's "Scope" Proposal Does Not Concern the "Rates of Pay, Rules, or Working Conditions" of JAL Employees.

The IAM's demand that JAL agree to stop contracting with other companies for work which has never been performed by JAL's own employees is not a demand "concerning rates of pay, rules, or working conditions" of those existing JAL employees who are represented by the IAM, and is therefore not a subject of bargaining mandated by the RLA.

We agree with the IAM that the cases in which courts have determined "whether a particular subject falls within 'rates of pay, rules, or working conditions'" are "relatively few" (IAM Br., p.28), by comparison with similar cases decided under the NLRA. However, all of the R. cases cited on pages 29-30 of the IAM's brief deal with the requirement to bargain about working conditions of existing employees. Not one of them even hints at a requirement to bargain over an asserted obligation to hire new employees. And the IAM has not found a single case among the admittedly more numerous NLRA cases which imposes such an obligation; nor has JAL.

On the contrary, the import of all the cases, both NLRA and RLA, is that a union may not use its undoubted right to bargain for existing employees to compel an employer to hire more employees, or to expand its bargaining rights. Cf. NLRB v. Local 445, International Union of Electrical Radio &

Machine Workers, ___ F.2d ___, Civil No. 75-4237, (2d Cir. February 10, 1976).

The IAM relies on Fibreboard Paper Products Corp. v. NLRB, 379 U.S. 203 (1964), to support its claim that the elimination of pre-existing subcontracting is a mandatory subject of collective bargaining (IAM Br., p. 34). The court below held, however, that the union reads Fibreboard too broadly (A-196); in fact, it misreads it.*

In Fibreboard, the Court said specifically that its holding was restricted to the "type of contracting out" involved in that case -- "the replacement of employees in the existing bargaining unit with those of an independent contractor to do the same type work under similar conditions of employment." Only that "type" of contracting was to be regarded as a mandatory subject for bargaining. 379 U.S., at 214-215.

Here it is not proposed replacement of existing employees which the IAM wants to bargain about. On the contrary,

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* The IAM seeks to present this case as "a variation of the Fibreboard situation, one which has apparently not been litigated heretofore. . ." (IAM Br., p. 35) The court below properly characterized this case as "in effect, . . . the reverse of Fibreboard" (A-196). A reverse-Fibreboard situation would seem to require a reverse-Fibreboard result, namely that the employer is not obligated to bargain over a decision whether or not to eliminate existing subcontracting and hire new employees to perform work at locations where such work has never been performed by his employees, just as, in Fibreboard, he was obligated to bargain over a decision to initiate subcontracting which directly led to the loss of jobs of existing employees.

it is the replacement of contractors' employees whom it does not represent, vis-a-vis JAL, on which the IAM wants to insist. The work which those employees do has never been performed by JAL employees (Pl. Ex. 18(a), ¶7, A-36; A-256-258, 495). The conditions for the employment of new JAL employees do not exist, but would have to be created by considerable capital investment (Pl. Ex. 18(a), ¶28, A-49-50; Pl. Exs. 8, 9, 10, E-18, 19, 20). And it is not JAL which is seeking to replace existing represented employees with those of an independent contractor; it is the union which seeks to force the replacement of employees of independent contractors by new JAL employees.*

Other "subcontracting" cases have stressed the limited extent of the Fibreboard holding. The First Circuit Court of Appeals, even with reference, as in Fibreboard, to new subcontracting, and not addressing itself to pre-existing subcontracting, has ruled that "a necessary condition to requiring an employer to bargain before entering into a subcontract is that the subcontract have an immediate adverse effect upon the bargaining unit." Puerto Rico Telephone Co. v. NLRB, 359 F.2d 983, 987 (1st Cir. 1966) (emphasis added). Since Puerto Rico

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* Defendants say that "[u]nder the RLA, decisions concerning future subcontracting have been presumed to be bargainable" (IAM Br. p. 34), citing KLM Royal Dutch Airlines v. Transport Workers Union of America, 56 LRRM 2205 (E.D.N.Y. 1964). In that case, however, the union struck KLM in order to force KLM to continue a contract with a subcontractor which employed members of the same union. The Court enjoined the strike. Without passing on the question whether the airline had to bargain with the union, the court held that the union could not strike against the carrier without going through whatever processes of the RLA were required.

Telephone holds that an employer may, without bargaining, initiate subcontracting of the same type of work which its current employees do, if that subcontracting does not have an immediate adverse effect on those employees, a fortiori, JAL cannot be required to bargain about pre-existing subcontracting.

Puerto Rico Telephone Co. does not stand alone; under the National Labor Relations Act, it is well settled that an employer need not bargain about a decision to initiate subcontracting or otherwise change the nature of its operation when the decision would not result in a significant detriment to bargaining unit employees. Bernal, Inc., 206 NLRB 72, n.1 (1973) (sale of an experimental rotary operation); Rochester Telephone Corp., 190 NLRB 161 (1971) (change in method of operations); Westinghouse Electric Corp. (Mansfield Plant), 153 NLRB 443 (1965) (subcontracting).

The union's position here goes beyond anything ever considered in cases where there was held to be a duty to bargain. The union is insisting not that JAL bargain with it before deciding to contract out work being done by IAM-represented employees but that JAL must eliminate a twenty-year practice of conducting large parts of its operations by contracting with other companies, in order to create for the union new jobs in which it may represent new employees. The limited duty to bargain only about prospective contracting-out which will have substantial adverse impact on existing employees which

the Supreme Court has enunciated cannot be heard as a duty to bargain about pre-existing contracting out which, by hypothesis, can have no impact on employees hired after that practice was established.

In Allied Chemical & Alkali Workers of America v. Pittsburgh Plate Glass Co., 404 U.S. 157, 179-180 (1971), holding that health insurance benefits for retired employees was not a mandatory subject of bargaining, the Court said:

> "[I]n each case the question is not whether the third party concern is antagonistic to or compatible with the interests of bargaining-unit employees, but whether it vitally affects the 'terms and conditions' of employment. . . .
>
> . . .In Fibreboard, after holding that 'the replacement of employees in the existing bargaining unit with those of an independent contractor to do the same work under similar conditions of employment' is a mandatory subject of bargaining, we noted that our decision did 'not encompass other forms of "contracting out" or "subcontracting" which arise daily in our complex economy.' 379 U.S., at 215, 85 S.Ct., at 405. The inclusion of retirees in the same insurance contract surely has even less impact on the 'terms and conditions of employment' of active employees than some of the contracting activities that we excepted from our holding in Fibreboard." (emphasis added) (footnote omitted).

Even more than retirees, whom the Court there held not be employees, people who have not even been hired by the employer are not employees entitled to be "represented" in advance by the representative of existing employees.

This Court has very recently written of the harmful effects of a union's efforts to expand its statutory

representation rights by attempting to bargain for employees not in the existing bargaining unit. In NLRB v. Local 445, International Union of Electrical Radio & Machine Workers, Civil No. 75-4237, (2d Cir. Feb. 10, 1976), the Court stated:

> "The acts which gave rise to Local 445's §8(b)(3) violation are disapproved of by the law because they erode the stability of the collective bargaining process. For that process to proceed on a sound footing, it is necessary that both labor and management understand and accept the boundaries of the bargaining unit. If those boundaries are uncertain, in constant flux or under perpetual challenge, labor and management are deflected from dealing with substantive issues and are instead preoccupied with procedural issues within the Board's ultimate control, i.e., determination of the bargaining unit." Slip Opinion, at p. 1838.

In the Local 445 case, the union was held to have violated the provisions of the NLRA by seeking to bargain for employees outside the certified bargaining unit. The IAM here similarly seeks to add to its representation rights by bargaining with respect to persons who are not even employees. See, also, Sperry Systems Management Division, Sperry Rand Corp. v. NLRB, 492 F.2d 63, 69 (2d Cir. 1974), cert. denied, 419 U.S. 831 (1974); Southern Pacific Co. v. Switchmen's Union of North America, 356 F.2d 332 (9th Cir. 1966).

In the Southern Pacific case, the court rejected another union's attempt to misuse its representation rights. SUNA, the union there, sought to force the railroad to bargain with it about a rule extending the switchmen's union craft lines from the yards in which its members were employed to include new

yards manned by members of another union. The court found that the proposed change did not relate to the working conditions of the craft that SUNA represented, but that the suggested alteration in craft lines bore directly on the working conditions of another craft and that the union was seeking to extend its control to another area of work. The court held that the carrier need not bargain on the union's demand. 356 F.2d, at 334-335.*

The IAM's characterization of the "Scope" demand as bargaining over "subcontracting" does not change the conclusion that JAL has no duty to bargain over "Scope." Thus, in Riverton Coal Co. v. United Mine Workers of America, 453 F.2d 1035, 1040 (6th Cir.), cert. denied, 407 U.S. 915 (1972), the court refused to countenance a union's similar characterization of its demands as bargaining about subcontracting when the work involved had never been done by the employees represented by the union. The long and short of it is that the union here does not want to bargain about new subcontracting which will adversely affect existing employees; it wants to eliminate existing subcontracting so that it may represent new employees.

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* The dictum from Southern Pacific Co. v. Switchmen's Union of North America, 356 F.2d 332, 334 (9th Cir. 1966) to which the IAM refers (IAM Br., p. 42) has nothing whatever to do with the IAM's claim here of a right to force JAL to hire new employees. When it referred in passing to "the securing of additional work by that craft" (emphasis in original), the Court did not even suggest that that would be a mandatory subject of bargaining if it would be necessary for the employer to hire new employees to do that work.

C. The IAM's Demand to Eliminate All JAL Contracting Out of Work Infringes Upon JAL's Basic Managerial Function to Determine the Scope of the Enterprise.

The IAM does not argue against the extensive case law which the court below relied upon in holding that the "Scope" proposal falls within "an area of managerial decision making within which the employer has no duty to bargain," (A-198); indeed, it does not even discuss these cases. Rather, the IAM attempts to minimize the impact of the "Scope" proposal upon JAL's enterprise (IAM Br., pp. 39-41). The record, however, clearly supports the district court's finding that the "'Scope' proposal goes directly to JAL's right to control the direction of its business enterprise. It goes to the heart of the method by which JAL has chosen to operate its business." (A-199).

There is no dispute that the IAM's "Scope" proposal would require JAL to hire numerous additional employees and acquire substantial new facilities for the performance of work which is now contracted-out. In order to perform all the mechanic, ramp and ground service work at all of its United States mainland stations with its own employees, JAL would need to hire, according to the IAM's own estimate, approximately 112 additional employees in classifications represented by the IAM (A-491-495) or, according to JAL's estimates, a total of from 213 to 235 employees (A-476; Pl. Ex. 18(a), ¶29, A-50) -- double the number of JAL employees currently represented by

the IAM.* The IAM, seeking to soften the impact of its demand, argues that this is "only a 1% increase in the total number of JAL employees", referring, of course, to all JAL employees worldwide (IAM Br. p. 40), not to those in the United States.

Moreover, the IAM does not dispute that JAL would need to invest capital to purchase very substantial additional equipment and facilities in order to permit employees to be hired by JAL to perform maintenance and ramp handling work at stations where work is currently contracted out, including purchase of specialized tools, trucks, and other equipment, and construction of office space and covered equipment storage docks (Pl. Exs. 8, 9, 10, E-18, 19, 20; Pl. Ex. 18(a), ¶28, A-49-50; A-278). The IAM, again seeking to minimize the effect of its proposal, states that even if JAL's monetary calculations are considered, the estimated $8 million in capital expenditures which would be required by the "Scope" proposal, "would amount to only 2 percent" of JAL's entire capital investment (IAM Br, p. 41), most of which, of course, is in aircraft.**

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* The IAM's estimate, made by Mr. Quick, did not take account of the work rule restrictions of JAL's Agreement with the IAM, but was based simply on a count of subcontractor employees A-496-497),and it assumed no need to hire any additional managerial or supervisory personnel (A-495-496).

** We do not think it makes any difference whether the Court knows the precise cost of the substantial amounts of equipment and sizeable buildings required, as shown by plaintiff's Exhibits 8, 9 and 10. The Court, however, should not be misled by the IAM's argument that capital costs cannot be considered since JAL chose to withdraw the figures for the cost of capital

Footnote continued/

Ignoring completely such recent cases as International Association of Machinists & Aerospace Workers v. Northeast Airlines, Inc., 473 F.2d 549 (1st Cir.), cert. denied, 409 U.S. 845 (1972) and International Union, United Automobile Aerospace & Agricultural Implement Workers of America v. NLRB, 470 F.2d 422 (D.C. Cir. 1972) [hereinafter cited as General Motors], the IAM argues that "Those earlier cases holding a large area exempt from bargaining as 'management prerogative' have been effectively overruled as the requirements of bargaining have expanded." (IAM Br., p. 41). The sole case cited for this proposition, Order of Railroad Telegraphers v. Chicago & North Western Ry. Co., 362 U.S. 330 (1960), was decided sixteen years ago, and held only that an employer must bargain over a decision to eliminate the jobs of existing employees by consolidating certain stations.

Contrary to the IAM's statement, the Court of Appeals in International Association of Machinists & Aerospace Workers

Footnote continued/

equipment and facilites, the necessary foundation for the employment of some 235 additional employees, because the district court erroneously, we believe, ruled that JAL would have to disclose its cost of having the work performed by contractors, if it left the capital costs in evidence.

Comparison of the capital costs with estimated labor costs for the proposed new employees cannot result in "meaningful analysis" (IAM Br., p. 40). Meaningful analysis would require comparison of the labor costs of the prospective 235 new employees with the labor costs which JAL pays to the contracting companies. It is not because of discrepancies in those costs that JAL prefers to have work done by contractors, but because it does not want to make the capital investment to do the work itself and because it does not want the managerial burdens of supervising an additional 235 employees.

v. Northeast Airlines, Inc. 473 F.2d 549 (1st Cir. 1972), cert. denied, 409 U.S. 845 (1972), confirmed that areas of fundamental managerial concern are not subject to any duty to bargain imposed by the RLA. The IAM sought a preliminary injunction to enjoin Northeast Airlines from consummating a proposed merger until the company bargained with the union about post-merger provisions for the seniority, employment and other rights of its employees represented by IAM. The union argued that Section 2, First of the RLA imposed upon the employer a statutory duty to bargain about the protection to be afforded employees in the event the merger took place, also maintaining that the merger decision itself was negotiable.

Citing Mr. Justice Stewart's concurring opinion in Fibreboard Paper Products,* the Court rejected the union's argument and held that the duty to bargain does not extend to require union participation in decisions "central to management's

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* "Decisions concerning the commitment of investment capital and the basic scope of the enterprise are not in themselves primarily about conditions of employment, though the effect of the decision may be necessarily to terminate employment . . . [T]hose management decisions which are fundamental to the basic direction of a corporate enterprise or which impinge only indirectly upon employment security should be excluded from that area [of mandatory collective bargaining]." (379 U.S., at 223).

The court below noted that the Supreme Court in Allied Chemical & Alkali Workers of America v. Pittsburgh Plate Glass Co., 404 U.S. 157, 178-182 (1971), evidently adopted the rationale contained in Judge Stewart's concurring opinion. (A-208).

autonomous control over the direction of the business' operations," such as a decision to merge. 473 F.2d at 556-557.*

Other courts, interpreting provisions of the NLRA analogous to those of the RLA, have defined the boundaries of the area of management decisions which are so closely tied to the employer's right to determine the scope of his own business that the employer can lawfully refuse to bargain about them. In General Motors, 470 F.2d 422 (D.C.Cir. 1972), Mr. Justice Clark, writing for the United States Court of Appeals, District of Columbia Circuit, summarized these decisions:

> "In applying the case-by-case approach, the Courts of Appeals have looked to several factors to determine if a decision is one 'primarily about the conditions of employment' or is instead 'fundamental to the basic direction of a corporate enterprise.' If the decision appears to be primarily designed to avoid the bargaining agreement with the union or it produces no substantial change in the operations of the employer, the courts have required bargaining .... If the decision resulted in

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* In Northeast Airlines, the Court held that an employer has no duty to bargain over a fundamental managerial decision, even where that decision does affect the working conditions of present employees. 473 F.2d, at 557. The court below, therefore, improperly qualified its decision when it said

> "... that under the RLA, there is an area of managerial decision making or prerogative which is not within the ambit of mandatory bargaining so long as there is no change in the existing working conditions of present employees." (A-198; emphasis added).

The error, however, is harmless in this case since JAL's pre-existing subcontracting does not affect the working conditions of JAL's present employees in any event, and it is not JAL which is proposing any change.

the termination of a substantial portion or a distinct line of the employer's business or involved a major change in the nature of its opertions, no bargaining has been required. N.L.R.B. v. Drapery Mfg. Co., 425 F.2d 1026, 1028 (8th Cir. (1970) [shut down of a drapery manufacturing division of a company involving 'a major shift of capital investment' that was purely economically motivated]; N.L.R.B. v. Transmarine Navigation Corp., 380 F.2d 933 (9th Cir. 1967) [the operation of a terminal moved to another location with the company's accepting minority interest in joint venture]; N.L.R.B. v. Royal Plating & Polishing Co., [350 F.2d 191 (3rd Cir. 1965)] [one of two plants closed down]; see also N.L.R.B. v. Dixie Ohio Express Co., 409 F.2d 10 (6th Cir. 1969) [procedures for loading and unloading substantially altered]; N.L.R.B. v. Adams Dairy, Inc., 322 F.2d 553 (8th Cir. 1963), remanded in light of Fibreboard, 379 U.S. 644, 85 S.Ct. 613, 13 L.Ed.2d 550 (1965), reaffirmed, 350 F.2d 108 (8th Cir. 1965), cert. denied, 382 U.S. 1011, 86 S.Ct. 619, 15 L.Ed.2d 526 [change in distribution method]; Machinists v. Northeast Airlines, Inc., 80 LRRM 2197 [(1st Cir. 1972)] [airline merger].'" 470 F.2d at 424-425 (emphasis added).

In the General Motors case, a decision by General Motors Corporation to convert a company-owned and operated retail outlet into an independently owned and operated franchise dealership was held to be a management decision not subject to the mandatory bargaining requirement of the NLRA. The decision to make the outlet an independent franchise followed GM's national policy to switch its remaining manufacturer-owned and operated retail outlets to independent franchises or dealerships. Such a decision was held to be "'fundamental to the

basic direction of a corporate enterprise.' It is the core of entrepreneurial control." 470 F.2d, at 425.*

Since, under General Motors, an employer does not have to bargain about the elimination of existing jobs when it determines to stop leaving capital invested in an aspect of its business, there cannot possibly be any obligation to bargain over a demand that the company invest capital to create new jobs. A decision not to dedicate capital in the first instance, even more plainly than the withdrawal of capital, "lies at the very core of entrepeneurial control." Triplex Oil Refining Division, 194 NLRB 500, 503 (1971); see also Stanley Oil Co., 213 NLRB No. 39 (1974); and Detroit, Toledo & Ironton R.R. v. Brotherhood of Locomotive Engineers, 74 LRRM 2723 (E.D. Mich. 1969) (not officially reported), in which the court held that a union could not strike over the railroad's refusal to bargain about trackage rights agreements which provided the conditions under which it would operate its equipment on the tracks of other railroads.

The decision which the IAM here seeks to impose on JAL is even more "fundamental to the basic direction of . . . [the] corporate enterprise," than the decision to withdraw capital involved in the General Motors case, 470 F.2d 422 (D.C. Cir.

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* Ozark Trailers, Inc., 161 NLRB 561 (1966), the only other case cited by the IAM in this part of its Brief (IAM Br., p. 41), was decided six years before and was not followed by the NLRB in General Motors Corp., 191 NLRB 951 (1971), petition for review denied, sub nom. International Union, United Automobile Aerospace & Agricultural Implement Workers of America v. NLRB, 470 F.2d 422 (D.C. Cir. 1972).

1972). The IAM does not seek to bargain with JAL about the effects of prospective management decisions which will have impact on present JAL employees. On the contrary, it seeks to force JAL to make a decision to alter the structure of its operation in the United States, to reverse a policy of running its business established for twenty years, even before the IAM represented any JAL employees. To require bargaining for such a purpose, with the concomitant right to strike if the employer does not accede to the union's demand, could only be described as a perversion of the purpose for which the RLA confers representation rights, i.e., to bargain about rates of pay, rules and working conditions of present employees.

D. The IAM's Other Arguments Concerning the Duty to Bargain Over "Scope" Are Without Merit.

Each of the IAM's numbered arguments (IAM Br., pp. 35-42) in support of its claim that JAL must bargain over the "Scope" demand is easily refuted.

1. There is No Custom or Practice of Bargaining Over Changes in the "Scope" Article.

The IAM asserts that "The parties have previously bargained about, and indeed, agreed to, changes in the 'Scope' article," referring to Appendix D of the existing Agreement (IAM Br., p. 35). Additionally, the IAM claims that JAL's position regarding 'Scope' is "completely contrary to the position regarding 'Scope' which it has taken in the past and should not overrule its past bargaining history on that issue." (IAM Br., pp. 37-

38). Neither proposition is correct. But more significantly even if correct, neither proposition would affect the status of "Scope" as a mandatory subject of bargaining.

Despite the IAM's efforts to give the impression that JAL has freely bargained over the "Scope" proposal in the past, the evidence shows that (1) the so-called "Scope of Agreement" article (Article I of Defs. Exs. A and B, E-43-44)*, which has remained virtually unchanged in the sixteen years it has been in the JAL-IAM Agreement (Pl. Ex. 18(a), ¶9, A-37-38) does not impose any requirement on JAL to stop contracting for work or to hire employees; (2) Paragraph A of Appendix D to the Agreement, the sole instance of an agreement to allow a work contract to end and to hire JAL's own employees, occurred in 1973 as the result of a Mediator's proposal, not bargaining, and involved only five employees with an insignificant capital expenditure at JFK Airport, where JAL already employed some 50 of its own employees in cargo-handling

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* Under Article I A and B, the contract covers the employees in the craft or class for which the Union was certified as representative by the NMB. It follows that work "coming within the jurisdiction of the Union," as described in Article I C, is the work of such employees. The Union has never contended that it is a contract violation for similar work to be done by persons who are not employees, in the many years that such work has been continuously subcontracted by JAL, during which time the contract, with Article I unchanged, has been successively renewed. This Court, of course, has no jurisdiction to construe the contract; any claim by the Union that the contract, despite the contrary practice, gives it "jurisdiction" over the work rather than over employees of JAL doing the work would be a minor dispute (Elgin, J. & E. Ry. v. Burley, 325 U.S. 711, 723 (1945)) to be processed under Article XIII of the Agreement and finally determined by the System Board of Adjustment.

functions* (Pl. Ex. 18(b), ¶7-9, A-114-118; see pp. 18-19, above); and (3) JAL has consistently refused to permit the IAM to participate in decisions as to what work JAL will do and what employees it will hire, by refusing to bargain with the Union on those subjects (see pp. 16-19, above).**

Even if the Union had established that the one instance in 1973 of agreement to hire five employees was the result of bargaining, nothing in the body of decided cases decrees that JAL would thereby have converted a non-mandatory subject of bargaining into a mandatory subject, for all time, and must henceforth permit the Union to participate in decisions about whether to hire employees. The courts have held the contrary.

In Allied Chemical & Alkali Workers of America v. Pittsburgh Plate Glass Co., 404 U.S. 157 (1971), supra, the Supreme Court held that health insurance benefits for retired employees was not a mandatory subject of bargaining, and that the union had no right to insist on bargaining over changes in such

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* Paragraph B of Appendix D clearly does not represent past bargaining on "Scope." It is simply a written confirmation of JAL's independent decision to hire its own plant mechanics at San Francisco and New York for ground equipment maintenance as soon as it could lease the necessary space, which it was then seeking, as is plainly stated in Appendix D.

** JAL was not required to refuse to negotiate on the IAM's "Scope" demand from the onset of negotiations, or to notify the IAM that JAL considered the scope demand to be a non-mandatory subject of bargaining, NLRB v. Davison, 318 F.2d 550, 558 (4th Cir. 1963), although nothing could be more clear than that JAL has said consistently that it would not bargain on the union's demand that it hire new employees.

benefits, even though the parties had negotiated over those benefits in the past, and included a provision governing them in their current contract. The Court explicitly said,

> "By once bargaining and agreeing on a permissive subject, the parties, naturally, do not make the subject a mandatory topic of future bargaining." 404 U.S. at 187.*

Plainly, then, even if past bargaining history were relevant to this case, the single agreement in 1973 to part of a Mediator's proposal which presupposed withdrawal by the union of the "Scope" demand is not bargaining about basic decisions as to the size and shape of the enterprise. It certainly does not establish a "custom or practice" of such bargaining.** (Cf. IAM Br., p. 35).

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* The IAM cites Order of R.R. Telegraphers v. Chicago & N.W.Ry. Co., 362 U.S. 330 (1960) for the statement that "the whole idea of what is bargainable has been greatly affected by the practices and customs of the railroads and their employees themselves" (IAM Br., p. 28). But the single instance on which the IAM relies and which the evidence shows was not an example of bargaining, but of acceptance of a Mediator's proposal, cannot constitute a practice or custom as between JAL and the IAM, let alone in the airline industry generally.

** The court below found that "JAL had refused to bargain" over "Scope" in negotiations over the 1972-73 contract (A-203). However, it concluded from JAL's eventual agreement to Paragraph A of Appendix D that "the parties had bargained about 'Scope'" in those negotiations (A-202-203). To the contrary, the IAM did not consider that JAL had bargained over "Scope" in the 1972-73 negotiations; in fact, the IAM negotiating committee refused to recommend ratification of that contract because it did not contain "concessions on 'scope'." (Pl. Ex. 18(b), ¶10, A-118; Pl. Ex. 18(a), ¶17, A-41-42; A-423-424, 432, 469-470, 267-268). To the extent that the district court's statement may constitute a finding as to bargaining on "Scope" in 1973, therefore, we believe it to be clearly erroneous.

2. JAL's Present Subcontracting Practices Do Not Have An "Immediate Adverse Effect on Present Bargaining Unit Employees".

There is absolutely no evidence to support the IAM's claim that "the extent of present subcontracting by JAL presents a threat to the job security of IAM members throughout the JAL system," (IAM Br., p. 38), contrary to the district court's finding that "existing subcontracting practices of JAL do not have an immediate and direct effect on the job security of present employees" (A-199).

The simplest answer to the IAM's claim that the "Scope" demand is "necessary to ensure basic job protection for bargaining unit members," (IAM Br., p. 39) is that the IAM-JAL Agreement provided almost complete job security for existing employees under a "No-Furlough" Agreement (Def. Ex. A, E-76-76a).*

Under the pretense of job security for Honolulu employees, the IAM says it must force the Company to hire some 235 new employees in San Francisco, Los Angeles, Anchorage, and New York, as well as continue a no-furlough clause under which JAL could not lay off not only the Honolulu employees,

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* Referring to the contractual right of laid-off employees to "bump" into other jobs and stations, the district court asserted that the existing subcontracting practices "in effect, limit the opportunity for laid off employees to take advantage of this right" (A-208), but concluded that "implementation of the IAM's 'Scope' proposal would only indirectly provide job security" (A-199). It is hard to see why the district court postulated "laid off employees" under a contract which prohibited layoffs, except under extraordinary conditions.

but the 235 new employees as well.* The next step presumably would be for the IAM to demand that JAL must hire an additional 250 employees in order to protect the job security of the 235 employees it is now told it must hire in order to protect the job security of the 212 employees it now has.

During the 20 years that JAL has subcontracted work at its United States stations, the number of IAM represented employees of JAL has increased from 0 to 215 (Pl. Ex. 18(a), ¶¶7, 8, A-36). The jobs of the JAL employees are not threatened by the subcontractors' employees who have had their jobs for many years longer than JAL employees doing similar work. It is the union here which is trying to use its representation of JAL employees to threaten the jobs of the subcontractors' employees, many of whom are, ironically, represented by other locals of the IAM (A-457).

The IAM finally makes the off-hand and unsupported assertion that "the presence of subcontracted employees gives the carrier 'leverage' in negotiations which could be detrimental to bargaining unit members" (IAM Br., p. 38). There is no evidence that this hypothetical "leverage" in bargaining, whatever

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* The IAM's reference to the proposed lay-off of nine employees at Honolulu in August 1974 has nothing to do with this case. JAL instituted that layoff based upon its interpretation of the conditions under which Appendix E of the contract permitted layoffs; the layoff was, in any event, cancelled before the IAM began the lawsuit referred to in the IAM brief. (Pl. Ex. 16(a), (b), (c), E-30, 31, 32; IAM Br., p. 39). If anything, the dispute between JAL and IAM over the interpretation of Appendix E demonstrated a need for possible revision of the No-Furlough clause, as the IAM, in fact, proposed (A-487-488) not for revision of the "Scope" clause, as the IAM now claims (IAM Br., p. 39).

it may be, or any other facet of JAL's pre-existing subcontracting of work, has any immediate adverse effect on bargaining unit employees.

3. The "Scope" Demand Intrudes Upon JAL's Basic Management Function.

As we have seen (pp. 42-43 above), the IAM seeks to compel JAL to hire 235 additional employees and invest 8 million dollars; its demand does not merely contemplate "a lawful accretion to the bargaining unit, which has been specifically agreed to by JAL in Article I, Section D of the collective bargaining agreement," (IAM Br., p. 40). The "Scope" demand is a proposal to change the existing agreement, not a claim of rights under existing contractual provisions.*

Moreover, the NLRB doctrine of "accretion" applies only where existing employees, because of similarity of skills and job conditions, are properly includable within a bargaining unit which is already represented; it has no application where there are no current employees to be added to the bargaining unit. See, e.g., Pacific Intermountain Express Co., 145 NLRB 805 (1964). And under the accretion doctrine

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* Only the System Board of Adjustment established under the RLA, not this Court, would have jurisdiction to construe provisions of the contract. International Association of Machinists & Aerospace Workers v. Northeast Airlines, Inc., 473 F.2d 549, 554-555 (1st Cir.), cert denied 409 U.S. 845 (1972).

followed by the National Mediation Board, unrepresented employees having a community of interest with represented employees may be included in a previously represented craft or class only after an election among the unrepresented employees. Hawaiian Airlines, NMB Case No. R-4531 (October 22, 1975); Braniff International, NMB Case No. R-4543 (October 30, 1975).

4. Even if the IAM's "Scope" Demand Violates No Specific Provision of the Railway Labor Act, It is Not a Mandatory Bargaining Subject.

In its last point, the IAM refers to a dictum of the court in Southern Pacific Co. v. Switchmen's Union of North America, which does not even say that it is lawful for a craft or class to seek to add to its work, by compulsory bargaining (IAM Br., p. 42). The most that can be read into the court's passing statement that the union's demand there was not directed "even to securing of additional work" for the craft or class it represented, is that the court would have been faced with a different question if the union was seeking to add to the work of the employees it represented in order to preserve their jobs. The Ninth Circuit neither said nor suggested anything contrary to this Circuit's very recent decision that a union may not, by the compulsion of bargaining, seek to expand the unit which it has been certified to represent. NLRB v. Local 445, International Union of Electrical Radio & Machine Workers, Civil No. 75-4237 (2d Cir. Feb. 10, 1976).

III.

Issues Concerning the Validity or Propriety of the Expired Temporary Restraining Order are Moot.

The IAM seeks to raise on appeal issues of jurisdiction, substance, procedure and discretion regarding the district court's issuance of a temporary restraining order on January 22, 1975, effective by its terms only until January 31, 1975. No appeal is taken from the court's subsequent extensions of the temporary restraint until the denial of JAL's request for preliminary injunction on February 21, 1975, when the temporary restraining order was dissolved (A-209).

The IAM's attempted appeal from the TRO, however, has been rendered moot by the expiration of the TRO according to its own terms over a year ago. Glen-Arden Commodities, Inc. v. Costantino, 493 F.2d 1027, 1030 (2d Cir. 1974). There is no effective relief which this Court can grant with respect to the TRO,* and the IAM has made no showing of damages or any other possible

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* The IAM's brief, in its statement of the remedy sought, only reemphasizes the futility of any determination by this Court as to the temporary restraining order. Thus, the IAM repeatedly says that the TRO "should be vacated by this Court" (IAM Br., pp. 19, 22, 26) and even that "the order of the Court below must be, if not entirely vacated, limited to a duration of no longer than five (5) days" (IAM Br., p. 22). Since the TRO being challenged has long since expired, there is nothing for this Court to vacate; and it would be an even more unreal exercise to "limit" the non-existing order to five days, particularly since, if appellant is right, the order expired by force of the statute, five days after issuance.

justification for consideration of these questions at this time. See, Hoover v. Hoover Co., 370 F.2d 524 (6th. Cir. 1966); International Union, United Mine Workers v. United States, 177 F.2d 29, 36 (D.C. Cir. 1949) cert. denied, 338 U.S. 871 (1949); Southard & Co., Ltd. v. Salinger, 117 F.2d 194 (7th Cir. 1941).

The present appeal from the TRO cannot be sustained on the theory, unstated by the IAM, that it has suffered damage from the issuance of the TRO which may eventually be recovered on the injunction bond posted by JAL. No damage has been claimed or demonstrated by the IAM. And since the IAM attacks on appeal only the initial nine-day TRO, it would have to demonstrate damage resulting exclusively from that initial order, and not from the subsequent extensions of the TRO. To the extent that the IAM complains that the TRO improperly exceeded five days (IAM Br., p. 22), it would be necessary to prove that damage was suffered in the four-day period in which the TRO allegedly was wrongfully in force.

What the IAM in fact seeks is a hypothetical pronouncement from this Court as to certain open questions concerning the applicability of Section 7 of the Norris-LaGuardia Act to actions for injunctions under the Railway Labor Act. The TRO expired more than a year ago, leaving no need for this Court to determine now whether appellant should be subject to

its restraint; but appellee nevertheless will briefly respond to appellant's arguments against the TRO*.

IV.

Even If Issues As to the TRO Are Not Moot, the IAM's Arguments are Without Merit.

A. The District Court Had Jurisdiction to Issue a TRO Against a Strike by the IAM.

The IAM confuses judicial discretion with jurisdiction in arguing that the district court was without jurisdiction to grant a TRO. (IAM Br., pp. 16-19). The court's jurisdiction to grant injunctive relief to enforce the requirements of RLA Section 2, First, notwithstanding the Norris-LaGuardia Act, was plainly upheld by the United States Supreme Court in Chicago & North Western Ry. Co. v. United Transportation Union, 402 U..S. 570 (1971). A fortiori, the district court had jurisdiction to issue the temporary restraining order to preserve its ability to issue an effective preliminary injunction, after the necessary time for careful consideration directed by

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* We do not believe it is necessary to address the question of the appealability of the TRO (IAM Br., pp. 10-15), both because the issue is moot, and because it no longer arises in the context of an interlocutory appeal. JAL's position that the TRO issued below is not appealable is fully presented in the Memorandum in Support of Motion to Dismiss the Appeal, in Docket No. 75-7060, dated January 27, 1975. The hearing of JAL's motion to dismiss was consolidated with the argument of the appeal by Order of the Court dated February 6, 1975.

the Supreme Court in that decision.* See Brotherhood of Locomotive Firemen and Enginemen v. Bangor & Aroostook R. Co., 380 F.2d 570, 583-584 (D.C. Cir.), cert. denied, 389 U.S. 327 (1967). On the evidence presented that the IAM was insisting on the "Scope" demand as a condition of any contract, the district court clearly did not abuse its discretion in issuing the TRO against insistence on what it later held to be a nonmandatory subject of bargaining.

B. Provisions of the Norris-LaGuardia Act Must Give Way to Overriding Provisions of Later Labor Statutes.

The Chicago and N.W. Ry. case continues the line of decisions in which the Supreme Court has established that the obligations imposed by various provisions of the Railway Labor Act are enforceable by injunctions, notwithstanding the provisions of the Norris-LaGuardia Act, and that the provisions of the two Acts must therefore be accomodated to each other. Virginia Ry. Co. v. System Federation No. 40, 300 U.S. 515, 563 (1937); Brotherhood of Railroad Trainmen v. Chicago River & Indiana R.Co., 353 U.S. 30, 40-41 (1957). See, also, N. Newborn, "Restrictions on the Right To Strike on the Railroads: A History and Analysis II," 23 Lab. L. J. 234 (1973). Norris-

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* The IAM's reliance on Order of R.R. Telegraphers v. Chicago & N.W. Ry. Co., 362 U.S. 330 (1960), decided more than ten years prior to the Supreme Court decision in Chicago & N.W. R.R. v. United Transporation Union, 402 U.S. 570 (1971), is misplaced. That case is merely authority for the proposition that injunctions will not issue when there is no clash between the purposes of the RLA and the Norris-LaGuardia Act. There, the Court specifically held that the alleged actions of the union did not constitute a violation of the RLA, and therefore no injunction was warranted.

LaGuardia's substantive prohibition on the district courts' jurisdiction to give injunctive relief has also been held inapplicable to actions under the National Labor Relations Act, first to compel employers to observe arbitration clauses in labor agreements, Textile Workers v. Lincoln Mills, 353 U.S. 448 (1957), and, more recently, to compel unions to proceed under such a clause rather than to violate a no-strike agreement, Boys Markets, Inc. v. Retail Clerk's Union Local 770, 398 U.S. 235 (1970). In both areas of labor disputes, however, i.e., under the Railway Labor Act, and in the limited specified situations under the NLRA, even when it was clear that the Norris-LaGuardia Act did not deprive the federal courts of jurisdiction to issue injunctions, questions remained as to the applicability of other provisions of Norris-LaGuardia to such injunctions as might be issued.

Simultaneously with its basic decision in Lincoln Mills, the Supreme Court held that the provisions of Section 7 of the Norris-LaGuardia Act are "inapposite" to the type of injunction which that case held to be authorized.* Under the

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* The Court said:

> "Section 7 of that Act [Norris-LaGuardia Act] prescribes stiff procedural requirements for issuing an injunction in a labor dispute. The kinds of acts which had given rise to abuse of the power to enjoin are listed in Section 4. The failure to arbitrate was not a part or parcel of the abuses against which the Act was aimed .... [W]e see no justification in policy for restricting section 301(a) to damage suits, leaving specific performance of a contract to arbitrate grievance disputes to the inapposite procedural requirements of that Act." (emphasis added) 353 U.S. at 458.

Railway Labor Act, in Brotherhood of Railroad Carmen v. Chicago & North Western Ry. Co., 354 F.2d 786 (8th Cir. 1965), the Court held that the trial judge had not erred in refusing to consider the Norris-LaGuardia Act in issuing a nine-day temporary restraining order, subsequently extended, against a strike over a minor dispute. The Court stated:

> "[Appellants] contend that even if the carrier is entitled to an injunction to prevent the illegal strike, the procedural protections of §§ 7 and 9 of the Norris-LaGuardia Act ... must be followed .... Otherwise, appellants contend, §§ 7 & 9 are, in effect, nugatory. The short and obvious answer to this contention ... is that §§ 7 & 9 still fully apply except where limited or modified by provisions or policies of a more recent and specific act, such as the Railway Labor Act." [Emphasis added] 354 F.2d at 796 (emphasis added)

Other courts have similarly refused to require literal compliance with Section 7 in RLA injunction actions. Railway Express Agency, Inc. v. Brotherhood of Railway, Airline & Steamship Clerks, 437 F.2d 388 (5th Cir. 1971) (preliminary injunction issued without oral testimony, where crucial facts stipulated to by counsel); Missouri-Kansas-Texas R. Co. v. Brotherhood of Locomotive Engineers, 266 F.2d 335 (5th Cir. 1959), rev'd on other grounds, 363 U.S. 528 (1960) (preliminary injunction issued without oral testimony and findings of fact, where material facts concerning the dispute were admitted); Certain Carriers v. Certain Employees, 56 LRRM 2559 (D.D.C. 1964) (not officially reported) (preliminary injunction motion determined on affidavits, despite requirements of 29 U.S.C. § 107);

Great Northern Ry. Co. v. Order of Ry. Conductors & Brakemen, 62 LRRM 2194 (D. Minn. 1966) (not officially reported) (bond on preliminary injunction required to conform with Rule 65 and not Section 7 of Norris-LaGuardia Act). In other cases, the provisions of Section 8 of the Norris-LaGuardia Act have been held not to bar injunctive relief required under general principles of equity. Chicago & North Western Ry. Co. v. United Transportation Union, 330 F. Supp. 646, 650-651 (N.D. Ill. 1971); Cox v. Northwest Airlines, Inc., 319 F. Supp. 92, 102-104 (D. Minn. 1970); Piedmont Aviation, Inc. v. Air Line Pilots Association, International, 416 F.2d 633, 638-39 (4th Cir. 1969), cert. denied, 397 U.S. 926 (1970).

Again, in cases arising under the National Labor Relations Act, where the federal courts have only limited jurisdiction to issue injunctions in aid of limited policies, courts have made necessary accommodation between the procedural requirements of the Norris-LaGuardia Act and the substantive labor policy in favor of arbitration declared by Congress. This Court has most recently reaffirmed that process of construction in Hoh v. Pepsico, Inc., 491 F.2d 556 (2d Cir. 1974), where it said that "§ 7 remains applicable so far as consistent with the policies of § 301 of the Labor Management Relations Act." 491 F.2d at 560 (emphasis added). See also Celotex Corp. v. Oil, Chemical & Atomic Workers Int'l Union,

516 F.2d 242, 246 (3d Cir. 1975).* Applying that reasoning to the undoubted power of the federal courts to issue injunctions in aid of the broad purpose of the Railway Labor Act to avoid interruption to commerce as well as to enforce the duty to exert every reasonable effort to make and maintain agreements, there can be little doubt that imposition of the limitations of Section 7 on the issuance of temporary restraining orders is not consistent with the policy of Section 2, First of the RLA.

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* The IAM cites this court's decision in Emery Air Freight Corp. v. Local Union 295, IBT, 449 F.2d 586 (2d Cir. 1971), cert. denied, 405 U.S. 1066, (1972), in support of the contention that "the Courts are still bound to strictly adhere to the tenets of the Norris-LaGuardia Act" (IAM Br., pp. 18-19). In Emery Air Freight, this Court reversed contempt citations, holding that the temporary restraining order on which they were based was improperly issued because the Boys Market criteria on which the order purported to be based were in fact not present. However, in dicta, this Court said that the restraining order was deficient in numerous respects, including its failure to conform to the provisions of Section 7 of the Norris-LaGuardia Act. 449 F.2d at 591-592.

As authority for this dictum, the Emery decision cited the Boys Markets decision and this Court's decision in New York Telephone Co. v. Communication Workers of America, 445 F.2d 39 (2d Cir. 1971). However, nothing in Boys Markets makes the "equitable remedies" it authorizes subject to the limitations of the Norris-LaGuardia Act; the Court there said that such relief would be justified despite the provisions of that Act, 393 U.S., at 254. The test of the propriety of such an injunction enunciated by the Court is "the ordinary principles of equity", 393 U.S., at 254. The Court cannot have intended by that test to by-pass the absolute prohibitions on injunctive relief imposed by Section 4 of the Norris-LaGuardia Act, while at the same time retaining the extraordinary shackles on the principles of equity imposed by Section 7. Moreover, both the Boys Markets and Communications Workers cases, in fact, affirmed the issuance of temporary restraining orders which were effective for more than five days. 398 U.S. at 239-240; 445 F.2d at 43-44. Hoh v. Pepsico, Inc., supra, must be read as at least a cautionary reconsideration of the Emery dictum.

C. The Time Restriction of Section 7 of the Norris-LaGuardia Act Has No Application in This Case.

The IAM argues that the substantive limitation of five days on temporary restraining orders imposed by Section 7 of the Norris-LaGuardia Act (29 U.S.C. § 107) was violated by the district court (IAM Br., pp. 20-22). Even assuming arguendo that Section 7 of the Norris-LaGuardia Act applies to actions for injunctive relief against violation of Section 2, First of the Railway Labor Act,* however, within five days after the TRO was issued, the court below, on January 27, 1975, after hearing, ordered that the temporary restraining order be continued in effect, whether "ab initio or by extension" up to and including January 31, 1975 (see pp. 22-23, above). The district court held that it had power to extend the temporary restraining order so long as it was not for an excessive period, whether or not the Norris-LaGuardia Act

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* This Court expressly left that question undecided in Pan American Airways, Inc. v. Flight Engineers International Association, 306 F.2d 840, 842 (2d Cir. 1962), and the United States Supreme Court similarly did not decide whether the Norris-LaGuardia time limitation, rather than Fed. R. Civ. P. 65, applies to the NLRA situation in which it is established that an injunction may issue despite Section 4 of the Norris LaGuardia Act. Thus, in Granny Goose Foods, Inc. v. International Brotherhood of Teamsters Local No. 70, 415 U.S. 423, 445, n.19 (1974), an action for a Boys Market type of injunction, the Supreme Court would not say that the TRO had to be limited to five days.

applied, and that an extension was compelled by the IAM's continued insistence on an opportunity to present witnesses at a hearing (on JAL's preliminary injunction motion) while at the same time refusing to consent to an extension of the temporary restraining order which would allow the court to hold such a hearing (A-334-335).

As the Seventh Circuit said in Toledo, Peoria and W. R. Co. v. Brotherhood of Railroad Trainmen, Enterprise Lodge No. 27, 132 F.2d 265 (7th Cir. 1942), rev'd on other grounds, 321 U.S. 50 (1944):

> "The obvious purpose of the five-day limit was to prevent restraint without a hearing on the question whether substantial and irreparable injury has been done to the employer, for so long a time as to affect materially the effort of the striking employees. But to hold that the provision denies the power of the court to continue the restraining order more than five days regardless of whether the hearing on application for temporary injunction is completed, would completely destroy the purpose of the legislation. There is ordinarily no reason why such hearing can not be begun within five days, but not infrequently it can not be completed within that time. Here, it required approximately two weeks. Obviously if the order had been dissolved within five days, there would have been a period of over a week during which defendants' acts, if unrestrained, might well have caused further irreparable damage. The purpose was to prevent possibility of irreparable damage and to preserve the existing status until an early hearing would determine whether a temporary injunction should be issued." 132 F.2d at 267. (Emphasis added).

The second response to the IAM's contention, again assuming that Section 7 governs, is that the five-day limitation, by the terms of the statute, did not apply in this case.

Section 7 imposes a five day limit on a TRO when the order is issued "without notice". Here, the application was made with notice to defendants, after a hearing had been held on plaintiff's motion for preliminary injunction on January 16, and defendants had submitted both affidavits and memoranda of law in opposition to that motion.* Indeed, the matter was ripe for decision on the motion for preliminary injunction, except that defendants insisted, at the hearing on January 22, 1975 on the application for a TRO pending the Court's decision on the preliminary injunction motion, that they be given an opportunity to present live witnesses (A-319-321).

Both because the TRO was extended before the expiration of five days and because it was issued after notice and a hearing, to avoid making the court's power to issue a preliminary injunction nugatory, there was no violation of the five day limitation of Section 7 even if it is to be held applicable. More fundamentally, JAL contends that the five-day

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* In Pan American World Airways, Inc.v. Flight Engineers, Int'l Association, 306 F.2d 840 (2d Cir. 1962) this Court rejected the argument that "the time limits set forth in Rule 65(b) (and Section 7(e) of the Norris-LaGuardia Act) are applicable only to situations where the temporary restraining order was issued ex parte." The Court's decision, however, was based on the provisions of Rule 65(b) which require consent of the restrained party to an extension beyond a second ten-day period, 306 F.2d at 842. Section 7 of the Norris-LaGuardia Act contains no corresponding provision governing extension of an initial ex parte order. Cf. Celotex Corp. v. Oil. Chemical & Atomic Workers, Int'l Union, 516 F.2d 242, 248 (3d Cir. 1975), where the court read the limitation in Section 7 as applying only to ex parte temporary restraining orders, and held the limitation applicable in an injunction action brought under Section 301 of Labor Management Relations Act.

limitation on temporary restraining orders contained in Section 7 of the Norris-LaGuardia Act must give way in injunction actions, such as this, brought to enforce the duty to exert every reasonable effort to make and maintain agreements imposed by Section 2, First of the RLA. As demonstrated above (pp. 60-64), courts have held that the provisions of the two Acts must be accomodated where the limitations of Norris-LaGuardia would prevent or hinder appropriate injunctive relief under the Railway Labor Act.

Under Chicago & North Western Ry. Co.v. United Transportation Union, 402 U.S. 570 (1971), district courts must examine the whole course of bargaining between the parties, often extending over more than a year, before determining that an anti-strike injunction is "the only practical, effective means of enforcing the duty to exert every reasonable effort to make and maintain agreements," 402 U.S. at 582. As the court below noted, adequate time is required for consideration of the complex legal and factual issues presented by an application for a preliminary injunction under RLA Section 2, First (A-312-313).

Unless a court is able to grant adequate temporary relief (within ordinarily adequate limitations of Fed. R. Civ. P. Rule 65(b)), it would be compelled either to permit the union to strike, thus violating the fundamental purpose of the Railway Labor Act "to avoid any interruption to commerce or to the operation of any carrier engaged therein," (RLA,

Section 2), or to issue a preliminary injunction on the basis of an abbreviated and inadequate hearing, contrary to the Supreme Court's caution of restraint in the issuance of such anti-strike injunctions. Chicago & North Western Ry. Co., supra, 402 U.S., at 583. The hearing in this case alone lasted five days, and the IAM itself requested an additional five days for submission of its post-hearing papers (A-502). Clearly, completion of the factual inquiry alone necessary under RLA Section 2, First, will not often be possible within five days, not to mention the additional time required for the court to carefully consider the factual and legal questions presented. Accommodation of the Norris-LaGuardia Act to the needs and purposes of the Railway Labor Act therefore requires that a TRO issued in an action to enforce Section 2, First of the RLA not be subject to the five day limitation imposed by Section 7 of the Norris-LaGuadia Act.*

D. The Temporary Restraining Order Was Not Issued in Violation of Procedural Provisions of Section 7 of Norris-LaGuardia Act.

The IAM complains that the temporary restraining order was issued without meeting various other procedural

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* The decision of the Third Circuit sua sponte in Celotex Corp. v. Oil, Chemical & Atomic Workers Int'l Union, 516 F.2d 242, 247 (3d Cir. 1975) that the five day limitation applies to an ex parte TRO issued in a Boys' Market type of action is easily explicable by the limited inquiry which must be made in such cases, namely, whether a strike over an arbitrable issue is threatened in violation of a no-strike agreement.

requirements of Norris-LaGuardia, including the lack of opportunity for the IAM to present witnesses, and the failure of the court to make the findings of fact enumerated by Section 107(a) through (e). (IAM Br., pp. 20-21). The short answer to this contention is that the provisions relied on apply only to the issuance of "temporary [preliminary] or permanent injunctions" and not to temporary restraining orders, which are are governed by a subsequent provision of the same section.

The court below complied fully with the requirements of Section 7 applicable to temporary restraining orders, even assuming those provisions govern in this case. The complaint contained the requisite allegations of substantial and irreparable injury (Complaint, ¶¶31, 34, 35, 37, A-18-20), which were inquired into at length by the court at the hearing on JAL's motion for a temporary restraining order (A-304-311), and the court received testimony under oath (and subject to cross-examination) prior to issuance of the temporary restraining order. Indeed, defendant had responded to JAL's testimony by submitting affidavits and a memorandum of law, prior to issuance of the temporary restraining order. It is absurd to argue, as the IAM does, that the grant of a temporary restraining order is dependent on the availability of witnesses on behalf of the party sought to be restrained, when the whole purpose of a temporary restraining order is to prevent irreparable injury prior to the completion of a hearing on the preliminary injunction motion. Here, too,

defendants had notice of the January 16 hearing on the motion for preliminary injunction, and chose not to bring any witnesses. Cf. Semmes Motors, Inc. v. Ford Motor Co., 429 F.2d 1197, 1204-1205 (2d Cir. 1970).

E. The Temporary Restraining Order Issued by the Court Below Was Not "Overly Broad".

The IAM's final attack on the temporary restraining order issued by the district court is that the order wrongfully "directly intruded upon the ongoing collective bargaining between the parties" by prohibiting the IAM from "directly or indirectly insisting or demanding that JAL bargain with the IAM" over the IAM's "Scope" proposal (IAM Brief, pp. 23-26). This provision of the temporary restraining order correctly anticipated the court's ultimate determination that "Scope" is not a mandatory subject of bargaining under the RLA. Plainly, unions may be ordered to refrain from insisting on a non-mandatory subject of bargaining; rather than constituting an "intrusion" into the collective bargaining process, such an order is necessary to preserve the conditions for bargaining over required subjects under the applicable labor Act. See, e.g., NLRB v. Wooster Division of Borg-Warner Corp., 356 U.S.

342 (1958); International Union of Operating Engineers, Local Union No. 12, 187 NLRB 430 (1970).*

Moreover, its correctness aside, the temporary restraining order could have had no appreciable effect on the negotiations, since JAL had refused to bargain over "Scope" long prior to the issuance of the temporary restraining order, as the IAM indeed acknowledged (IAM Br. p. 37). In this context, the IAM's assertion that the prohibition against its insistence upon "Scope", constituted an "intrusion" into collective bargaining is ludicrous. Indeed, the IAM's contention that the temporary restraining order forced "a complete restructuring of bargaining priorities" and that it was "forced to take positions not indicative of the way it would negotiate were 'Scope' still on the table" (IAM Br. p. 25) simply proves JAL's point that the IAM's insistence upon "Scope" had unlawfully prevented agreement on "rates of pay, rules and working conditions", as required by RLA, Section 2, First.

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* National labor policy does not require simply maintenance of the "status quo," as the IAM suggests (IAM Br., p. 26), where the "status quo" includes a violation of the RLA. See Steeler v. Trading Port, Inc., ___ F.2d ___, 77 CCH Lab. Cas. ¶10,900 (2d Cir. 1975).

Conclusion

The IAM's appeal from the temporary restraining order issued on January 22, 1975 (Docket No. 75-7060) should be dismissed as moot, since there is no need in this case to resolve the difficult, open questions about the applicability of Section 7 of the Norris-LaGuardia Act briefly discussed in Point IV. The final declaratory judgment issued by the district court should be affirmed.

Respectfully submitted,

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